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In The

Supreme Court of the United States

October Term, 1982

MARK S. SAVOY and ROBERT J. TARR,
Petitioners,

vs.

COMMONWEALTH OF MASSACHUSETTS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

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QUESTION PRESENTED

Whether the petitioners' Fifth and Fourteenth Amendment rights not to be placed twice in jeopardy will be violated by their trial on charges to which they have already pled guilty, been sentenced, and commenced execution of said sentences.

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OPINIONS BELOW

The opinion of the Supreme Judicial Court of Massachusetts is reported in 386 Mass. 260, 435 N.E.2d 330 (1982). (A copy of said opinion is appended hereto as Appendix A.) The related opinion of the District Court below was not reported. (A copy of said opinion is appended hereto as Appendix B.)

JURISDICTION

The judgment of the state court (Appendix A) was entered on May 13, 1982. Rehearing was sought on May 25, 1982, and on June 3,

1982, the Supreme Judicial Court of Massachusetts denied the petition for rehearing. (Copies of the petition for rehearing and of the denial of said petition are appended hereto as Appendices C and D respectively.) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257 (3), as the validity of a state statute is drawn in question on the grounds of its being repugnant to the Constitution of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fifth Amendment, United States Constitution, which provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The Fourteenth Amendment, United States Constitution, which provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce

any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State Legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid

or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection of rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

3. The statutes under which Petitioners were prosecuted, though nothing turns on their terms, are M.G.L. c.265, §§13A and 22, and M.G.L. c.266, §127, and are appended hereto as Appendix E.

4. Massachusetts Rule of Criminal Procedure 29(a), which the state court relied upon in determining that the petitioners' sentences could be increased *sua sponte* by the trial judge, provides as follows:

The trial judge upon his own motion or the written motion of a defendant filed within sixty days after the imposition of a sentence, within sixty days after receipt by the trial court of a rescript issued upon affirmance of the judgment or dismissal of the appeal, or within sixty days after entry of any order or judgment of an appellate court denying review of, or hav-

> ing the effect of upholding, a judgment of conviction, may, upon such terms and conditions as he shall order, revise or revoke such sentence if it appears that justice may not have been done.

The predecessor statute to Massachusetts Rule of Criminal Procedure 29(a), M.G.L. c.278, §29C, repealed by St. 1979, c.344, §48, provides:

> If it appears to the superior court that justice has not been done or cannot be done, it may within sixty days after a sentence has been imposed, upon such terms and conditions as it shall order, revise or revoke any sentence imposed: if such sentence was imposed without trial after a plea of guilty or nolo contendere the court may in the event of such revocation permit the withdrawal of the plea upon which the sentence was imposed.

STATEMENT OF THE CASE

On August 5, 1980, the petitioners were indicted by a Grand Jury sitting in Norfolk County, Commonwealth of Massachusetts, on charges of rape, unnatural rape, malicious destruction of personal property and assault and battery. On October 5, 1981, in the Superior Court Department, Norfolk County, Commonwealth of Massachusetts, petitioners Savoy and Tarr, along with co-defendants Richard Dovel, John Strickland and Alexander Aldoupolis, pleaded guilty to charges of rape, unnatural rape and malicious destruction of property. Abrams, J. accepted their guilty pleas and sentenced them to suspended sentences of from three to five years at the Massachusetts Correctional Institution (hereafter M.C.I.) at Walpole; two years probation; and imposed court costs of Five Hundred Dollars ($500.00), to be paid at the rate of five dollars ($5.00) per week.

Petitioners Savoy and Tarr began serving their sentences by signing a probation contract, commencing probation, and beginning payment of the imposed court costs prior to October 9, 1981. Each petitioner has continued to pay the court costs up to the present date.

On October 8, 1981, the then counsel for each petitioner was notified to appear in court the following day, but was given no reason for such required presence.

On October 9, 1981, Abrams, J., claiming to be acting pursuant to Massachusetts Rule of Criminal Procedure 29, revoked the suspension of the sentences and ordered each defendant to stand committed at M.C.I. Walpole, if they did not elect to withdraw their guilty pleas by October 13, 1981. (A copy of the transcript of the October 9, 1981 proceedings is appended hereto as Appendix F.)

Petitioners obtained a stay of the Superior Court proceedings on October 9, 1981, from a single justice of the Supreme Judicial Court. (A copy of the order staying proceedings is appended hereto as Appendix G.) Ultimately, the matter was reserved and reported to the full court by the single justice. (A copy of said reservation and report is appended hereto as Appendix H.)

On May 13, 1982, the Supreme Judicial Court, in *Aldoupolis v. Commonwealth*, 386 Mass. 260, 435 N.E. 2d 330 (1982), held (1) that the original suspended sentences *were* legally imposed; (2) that a trial judge does have the power to revise and revoke sentences on his own power so as to increase their severity and that such resentencing does not violate the constitutional prohibition against double jeopardy; and (3) that the defendants did not receive proper notice and an opportunity to be heard on the issue of a revision and revocation of their sentences, thus rendering the trial judge's resentencing invalid. The court ruled that the judge had the power to vacate the original sentences and impose new ones and directed the Superior Court to resentence the defendants even though it had declared the original suspended sentences valid. (See Appendix A.)

On May 25, 1982, the petitioners petitioned the Supreme Judicial Court for a rehearing, requesting that the remand for "resentencing" be revised to a remand "for action consistent with this Court's opinion." The petitioners also requested reconsideration of the double jeopardy claim. (*See* Appendix C.) The court denied the Petition for Rehearing on June 3, 1982. (See Appendix D.)

On June 25, 1982, a Superior Court judge ordered the petitioners to appear for resentencing at 10:00 a.m. on July 1, 1982.

On Monday, June 25, 1982, petitioner Savoy filed a complaint under 42 U.S.C. § 1983 in the United States District Court for Massachusetts, requesting that the resentencing scheduled for July 1, 1982, be enjoined. On June 30, 1982, the United States District Judge Robert E. Keeton denied petitioner Savoy's request for an injunction and for a stay of proceedings pending appeal on the same day. (A copy of the denial of petitioner's request for injunctive relief is appended hereto as Appendix I.)

On the same day, June 30, 1982, the Circuit Court of Appeals denied petitioner Savoy's appeal from District Judge Robert E. Keeton's order. (A copy of the denial of the appeal is appended hereto as Appendix J.)

Immediately thereafter, on June 30, 1982, petitioners' co-defendant, Alexander Aldoupolis, applied to this Court for a stay of the order of the Supreme Judicial Court of Massachusetts. On July 1, 1982, the Honorable William J. Brennan, Jr., Associate Justice of the United States and Circuit Justice for the First Circuit, granted Aldoupolis' application for stay until July 8, 1982.

On July 1, 1982, pursuant to the aforesaid stay issued by Mr. Justice Brennan, the Norfolk County Superior Court for the Commonwealth of Massachusetts, per Roger J. Donahue, J., Associate Justice of the Superior Court, ordered that petitioners' resentencing be stayed until July 15, 1982.

On or about July 6, 1982, petitioners applied to this Court for a stay of execution of their resentencing per order of the Supreme Judicial Court of Massachusetts, and sought to consolidate their application with the application filed by their co-defendant, Alexander Aldoupolis, in this Court on June 30, 1982.

On July 6, 1982, the Honorable Mr. Justice Brennan denied petitioners' aforesaid application without prejudice, and vacated the stay which had been granted relative to the petitioners' co-defendant, Aldoupolis, also without prejudice. (See Application for Stay of the Order of the Supreme Judicial Court of Massachusetts, No. A-1140.)

On July 12, 1982, petitioners filed a petition with a single justice of the Supreme Judicial Court of Massachusetts, wherein they requested that the petitioners be allowed to withdraw their guilty pleas in this matter in the Superior Court Department of the Trial Court, Norfolk Division. Petitioners preserved their rights to pursue their double jeopardy claims but moved to withdraw their guilty pleas to avoid the illegal resentencing procedure and further punishment. (A copy of said petition for relief is appended hereto as Appendix K.) Said petition was denied without an opinion on or about July 14, 1982.

When petitioners appeared for resentencing in the Superior Court Department, Norfolk Division, on July 15, 1982, they filed motions to withdraw their guilty pleas, claiming that, if they were to be forced to undergo an unconstitutional resentencing proceeding, they should be allowed to withdraw their guilty pleas as per Justice Abrams' offer on October 9, 1981. Petitioners expressly reserved their rights to challenge the resentencing proceeding and any prospective trial on double jeopardy grounds in revised motions, and reiterated that the withdrawal of their pleas was requested only to avoid the substantial probability of immediate incarceration if they failed to do so. (A copy of each petitioner's Motion to Withdraw his Guilty Plea is appended hereto as Appendix L & La.)

REASONS FOR GRANTING THE WRIT

This case entails serious double jeopardy concerns. It is universally agreed that, when no trial occurs in a criminal proceeding because the defendant pleads guilty, jeopardy attaches upon the court's acceptance of the guilty plea. *United States v. Jerry*, 487 F.2d 600,606 (3rd Cir. 1973); *Anno: Plea of Guilty as Basis of Claim of Double Jeopardy in Attempted Subsequent Prosecutions for the Same Offense*, 75 A.L.R.2d 683 (1961).

Once the court accepts the guilty plea, therefore, "principles of fairness and finality require that [the defendant] not be subjected to the possibility of further punishment by being again tried or sentenced for the same offense." *United States v. Wilson*, 420 U.S. 333, 343 (1975); see also *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

That jeopardy had attached here, when petitioners pleaded guilty on October 5, 1981, the court accepted those pleas and valid sentences were imposed upon petitioners, is beyond question. Petitioners have already served many months of their legally imposed sentences, and have been forced to endure the obloquy that accompanied the extensive publicity of their case.

The state court, in ordering that petitioners be resentenced, has thus violated the very essence of the double jeopardy clause, in that its order subjected the petitioners to the specific dangers the clause was designed to prevent—"the possibility of further punishment". *United States v. Wilson, supra* at 343. What is most indefensible about the order, is that it was made, despite the fact that the court recognized the validity of the original sentences that were imposed. There has yet to be a decision rendered by this Court, or by any state or lower federal court, that has sanctioned resentencing in light of such obvious double jeopardy dangers.

The Massachusetts Supreme Court, however, determined that, in light of this Court's holding in *United States v. DiFrancesco*, 449 U.S. 117 (1980), Rule 29 of the Massachusetts Rules of Criminal Procedure offered the petitioners sufficient notice that their sentences could be increased *sua sponte* by the trial judge within sixty days after imposition to avoid double jeopardy implications. *Aldoupolis v. Commonwealth*, 386 Mass. 260, 274, 435 N.E.2d 330, 338 (1982).

According to the state court, *DiFrancesco, supra*, was "dispositive of the double jeopardy claims of the defendants." *Id.*, 386 Mass. at 274-75, 435 N.E.2d at 338. "The conditional notice of a sentence under the sixty day period for revision or revocation pursuant to Rule 29" was viewed as "analogous" to the appeal provisions of 18 U.S.C. §3576 (1970) [dangerous special offender statute] in that the federal statute did not render a sentence final until after disposition of the government's appeal or until the time for appeal had lapsed. *Id.*

The state court was wrong in equating Rule 29 with 18 U.S.C. §3576: that latter statute contains specific language permitting the government to appeal a defendant's sentence, whereas Rule 29 simply tracks, with minor alterations, the language of its predecessor, M.G.L. c.278, §29C, which heretofore had never been interpreted to allow the trial judge's actions in this case. Hence the petitioners were given insufficient, and arguably, no warning that their sentences could be increased, and their legitimate expectation of finality in their sentences is protected under the double jeopardy clause.

DiFrancesco did not, of course, extinguish the double jeopardy clause's application to the sentencing phase of a criminal proceeding. In a five to four decision this Court held narrowly that a statute could provide for review of a defendant's sentence initiated by the prosecution where the statute properly warned the defendant that such review was possible. *United States v. DiFrancesco, supra* at 136.

This Court emphasized throughout the decision that the defendant was at all times aware that "a dangerous special offender statute

is subject to increase on appeal." *Id.* The defendant was "charged with knowledge of the statute and its appeal provisions" and thus "ha[d] no expectation of finality in his sentence." *Id.*

Hence, this Court did not overturn prior precedent barring an increase in sentence by the trial court after service of the sentence has begun; it simply confined such precedent to the specific context in which the defendant did not have sufficient notice of the possibility of a revision of his sentence, and thus would anticipate that his original sentence would be his final one.

Any doubts that the double jeopardy clause has remaining vitality in the sentencing process have been laid to rest in *Bullington v. Missouri*, 451 U.S. 430 (1981). In *Bullington*, the defendant was convicted of capital murder and the jury sentenced him to life imprisonment rather than to death pursuant to the applicable Missouri procedure. The defendant subsequently had his conviction reversed. The state then announced that it would again seek the death penalty. This Court held that subjecting the defendant to another sentencing proceeding would violate his rights under the double jeopardy clause. *Id.* at 446-47.

Other post-*DiFrancesco* courts have similarly applied the double jeopardy clause to the sentencing stage. In *Bullard v. Estelle*, 665 F.2d 1347 (5th Cir. 1982), for example, the defendant claimed that the prosecution's failure to adduce sufficient proof of two prior felony convictions in a sentence enhancement proceeding barred his resentencing upon remand. *Id.*, at 1349. The Texas Court of Criminal Appeals had determined that the state had not proven the existence of *Bullard's* two prior felonies. *Id.* Such proof was necessary to enhance the defendant's punishment on his third conviction. *Id.*, at 1358. When the Texas appellate court remanded for a new sentencing hearing, however, thereby allowing the prosecution a second bite of the apple at proving the prior offenses, *Bullard* petitioned for habeas corpus relief. The Fifth Circuit granted the petition finding that the

resentencing violated *Bullard's* double jeopardy rights. *Id.*, at 1362. See also *Myers v. State*, 48 Md.App. 420, 427 A.2d 1061 (1981).

Every court which has been faced with attempts to resentence a criminal defendant subsequent to this Court's opinion in *DiFrancesco* has either read that case narrowly upon its own facts, or only applied it to situations where the original sentence was illegal.

In *United States v. DeLeo*, 644 F.2d 300 (3d Cir. 1981), the defendant moved pursuant to Fed.R.Crim.P.35 to correct his sentence, where an order of restitution exceeded the actual amount of damages. The judge, instead of reducing the amount of restitution, substituted a fine in the original amount of restitution. The Court of Appeals reversed, stating that "[T]he principle of finality underlies the rule that a court may not substantively alter a judgment without specific authorization." *Id.* at 301.

Similarly, in *United States v. Williams*, 514 F.Supp. 334,335 (E.D.Pa. 1981), the defendant was sentenced to a term of imprisonment and of probation. He challenged the imposition of probation pursuant to 18 U.S.C. §3651 where the sentence of incarceration was not suspended. *Id.* The Court acknowledged that *DiFrancesco* raised the possibility that it could resentence the defendant altogether, but declined to do so, and vacated the sentence of probation. *Id.*, at 336.

Several Circuits have read *DiFrancesco* to permit resentencing on one charge where a second charge was found to be duplicitous of the first. In *United States v. Busic*, 639 F.2d 940 (3d Cir. 1981), the defendant's conviction for use of a firearm to commit a felony was vacated because it was duplicitous of the conviction for assault with a dangerous weapon. The sentencing judge had not given the defendant the maximum term on the assault charge because he had been able to enhance the punishment on the use of a firearm charge, which required that any sentence imposed run consecutive to other charges. The Court held that as the judge considered the charges interdepend-

ent for sentencing purposes, he should be able to resentence on the valid conviction to achieve his original purpose. *Id.* at 947. The Second Circuit in *McLain v. United States*, 676 F.2d 915,918 (2nd Cir. 1982), reached a similar conclusion, but was careful to point out that double jeopardy problems might arise where it was apparent the sentencing judge attempted to insure against invalidation of one sentence by imposing harsher punishment on the other.

Such cases are, of course, readily distinguishable from the present one. The petitioners here did not initiate an attack upon their convictions or sentences, nor were their sentences deemed invalid. Whereas in *Busic* and *McClain, supra*, the invalidity of one sentence so tainted the other that resentencing was called for; here the disposition had no flaws and double jeopardy considerations prevent resentencing.

Some state courts have refused to apply *DiFrancesco* where the statute in question is not absolutely clear on the issue of finality. In *Matter of Shriner*, 95 Wash.2d 541, 627 P.2d 99 (1981), the sentencing court imposed terms of imprisonment on two separate charges, but failed to specify whether they should run concurrently or consecutively. Three months later, the court concurred with the prosecutor's recommendation to the Board of Prison Terms and Paroles that the sentences be consecutive. The relevant state statute provided that sentences should be served concurrently unless otherwise specified. The court held that, where the original sentence was not illegally imposed, it could not be changed. *Id.*, at 101; *cf. State v. Pina*, ____Conn.____, 440 A.2d 962 (1981) (Court which failed to specify if defendant's sentences were concurrent or consecutive, could not resentence defendant ninety-eight days later to consecutive terms).

Thus *DiFrancesco* did not remove sentencing from the protections of the double jeopardy clause: it simply restricted the applicability of the clause to situations in which the defendant would have a

legitimate expectation of finality in his sentence. Such was the case here.

No Massachusetts precedent permitted an increase in a defendant's sentences once he had commenced execution of that sentence. Granted, no case had specifically outlawed such an increase on its own facts; however, every pronouncement from the Massachusetts Supreme Judicial Court adumbrated such a holding.

A fair summary of existing Massachusetts law in this area is furnished in the Reporters' Notes accompanying Rule 29. The Notes provide that, "The rule governs *reductions* of sentences motivated by demands of fairness." Mass.Ann.Laws, Criminal Procedure 474 (Lawyers Co-op.Pub.Co. 1979). (Emphasis added). *Quoting from District Attorney for the Northern District v. Superior Court*, 342 Mass. 119, 128, 172 N.E.2d 245, 250 (1961), the Notes point out that the Rule will allow review of a sentence where a "conscientious judge . . . feel[s] that he has been too harsh or has failed to give due weight to mitigating factors which properly he should have taken into account. . . ." Mass. Ann. Laws, *supra*. The Reporters' Notes further allude to the common law view that a sentence may be increased if execution of that sentence has not begun; however, "[t]hat an increase in the sentences once execution has commenced is not permitted has . . . long been settled."[1] *Id*.

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[1]The common law tradition preventing resentencing once execution of sentence has begun adds support to petitioners' anticipation of finality in their sentences. That tradition may be found in most of the jurisdictions treating the subject matter. See *Anno: Power of trial court to change sentence after commitment or payment of fine*, 168 A.L.R. 706 (1947). A list of the states and representative cases therefrom adhering to this rule is appended hereto as Appendix M. That the vast majority of states, including Massachusetts, had deveoped such a longstanding rule, cuts broadly against the Supreme Judicial Court's asseertion that Rule 29 gave proper warning of such a drastic change in existing law.

The language from the Reporters' Notes thus clearly indicates that Rule 29 was designed to authorize a reduction in sentence imposed upon a defendant which the trial court believes is too severe; it does not authorize an increase in sentence once execution of the sentence has begun.

The Notes, however, only touch the surface of Massachusetts law regarding resentencing. From early times in Massachusetts, "the importance of the fact that a sentence has not been executed in whole or in part has been recognized in cases where the power of the court to amend or set aside and impose a new sentence has been involved." *District Attorney for the Northern District v. Superior Court, supra,* 342 Mass. at 125-26, 172 N.E.2d at 249, quoting *Fine v. Commonwealth,* 312 Mass. 252, 256, 44 N.E.2d 659 (1942). A sentence is a "final judgment in a criminal case, and that is the end of the case, apart from statutory provisions, so far as concerns the usual and ordinary control of the court. . . ." *Fine v. Commonwealth, supra,* 312 Mass. at 256, 44 N.E.2d at 662.

Although a court is not barred from reducing a sentence of imprisonment simply because a defendant has served a part of it, it is established in Massachusetts that, absent some special statutory authority, a trial court has no power to modify upward a defendant's sentence once execution of the sentence has commenced. *District Attorney for the Northern District v. Superior Court, supra,* 342 Mass. at 127-29, 172 N.E.2d at 249-50; *Commonwealth v. Foster,* 122 Mass. 317, 323, 23 Am. Rep. 326 (1877). This principle even extended to situations in which the sentence was illegal or erroneous.

In *Commonwealth v. Foster, supra,* for example, a defendant had been found guilty on several counts of an indictment, but was initially sentenced upon only two of the counts. The defendant was then imprisoned under the sentence. The district attorney, some three years later, moved for sentencing upon a third count, and the trial court passed sentence over the defendant's objection upon the third

count. The Supreme Judicial Court held that the defendant could not be sentenced upon this other count during a subsequent term to which the case had been continued, even if the first sentence on the two counts was erroneous. *Id.*, at 323. *See also Mark Sennot's Case*, 146 Mass. 489, 493, 16 N.E. 448, 451 (1888).

In *Commonwealth v. O'Brien*, 175 Mass. 37, 39-40, 35 N.E. 466, 467 (1899), the court held that the statutory power to stay sentence and thereafter, "to deal with the sentence whenever the exceptions are overruled . . . impliedly includes the power to correct any illegality or error in sentence, *provided it then remains wholly unexecuted*". (Emphasis added.)

Numerous other cases further establish the proposition that once the defendant commences execution of an erroneous sentence in excess of the court's jurisdiction, the sentence is not void but only voidable at the defendant's instance by bringing a writ of error. See *Gallinaro v. Commonwealth*, 362 Mass. 728, 736-737, 291 N.E.2d 420, 425 (1973); *Commonwealth v. Conroy*, 333 Mass. 751, 756-757, 133 N.E.2d 246, 249-250 (1956); *Commonwealth v. Morgan*, 280 Mass. 392, 394, 182 N.E. 926, 927 (1932); *Commonwealth v. Murphy*, 174 Mass. 369, 372, 54 N.E. 860, 861 (1899), aff'd, *Murphy v. Massachusetts*, 177 U.S. 155 (1900); *see also Hickman v. Fenton*, 120 Neb. 66, 231 N.W. 510 (1930). If a defendant elects to bring a writ of error to attack an allegedly erroneous sentence, his sentence may be increased on resentencing because he is "deemed to have waived any constitutional objections that he might have to another trial or to the entry of a proper judgment."[2] *Commonwealth v. Murphy, supra*, 174 Mass. at 371, 54 N.E. at 861. It is crystal clear, however, that it is the right an privilege of the defend-

[2]This statement is subject, of course, to the provisions in *North Carolina v. Pearce, supra*, 395 U.S. 711, requiring a trial judge to state the reasons on the record for any increase in sentence after a successful appeal.

ant, and the defendant alone, to bring the writ of error and reverse the sentence; and conversely, "the defendant might well waive the error and submit and perform the judgment and sentence without being subjected to another conviction and punishment for the same offense." *Commonwealth v. Loud*, 44 Mass. (3 Met.) 328, 329-30, 37 Am. Dec. 139 (1841); *See Commonwealth v. Murphy, supra.*

This long line of Massachusetts cases holds unequivocally that, once a criminal defendant has begun to serve the sentence imposed upon him, he may not be brought back into the same court and given a harsher punishment. This rule prevailed even where the sentence may have been illegal. Certainly under these circumstances no criminal defendant in Massachusetts could anticipate that Rule 29 would be interpreted to allow such an increase. Because these petitioners had no reason not to expect their sentences to be final, the double jeopardy clause forbids their revocation and increase.

Thus, the criteria relied upon by the state court (Appendix A), in ordering resentencing of petitioners runs counter to the most basic double jeopardy principles, and, its order must be set aside.

Any argument that petitioners have now waived the right to assert their former jeopardy claims, because they have withdrawn their guilty pleas, is untenable. The withdrawal was made under the Damoclean sword of the resentencing proceeding, and thus no waiver of petitioners' double jeopardy claims may be inferred.

Whether an accused has waived his federal rights is a matter of federal law, and an effective waiver of a Constitutional right requires "an intentional relinquishment of [such] known right or privilege". *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). The petitioners here never gave up their rights to pursue their double jeopardy claim, but rather have vigorously opposed their resentencing. In addition, they specifically preserved their privilege to pursue their constitutional claim when making the motions to withdraw their pleas. The fact that

petitioners have adequately protected their rights, coupled with the fact that this Court "indulge[s] every reasonable presumption against waiver of constitutional rights", strongly militates against a determination that these rights have been so waived. *Id.*

Moreover, waiver, in order to be valid, must not be the product of duress. *United States v. Jackson*, 390 U.S. 570 (1968). This Court has previously denounced procedures "that needlessly chill the exercise of constitutional rights" by either offering an incentive for waiving the fundamental right or by imposing harsher penalities for asserting that right. *Id.*, at 582-583. That is precisely, however, what occurred here.

The petitioners were presented with the "Hobson's choice" of either 1) withdrawing their guilty pleas and thereby avoiding the imminent prospect of incarceration, yet facing the obvious challenge by the government that by so doing they have waived their double jeopardy claims; or 2) letting their guilty pleas stand with the distinct probability that the new sentence would be an increase over the valid original sentence. This Court must "'require something more substantial than a Hobson's choice'" before these petitioners "can be said to have relinquished voluntarily" their constitutional rights. *United States v. Dinitz*, 424 U.S. 600, 608 (1976), *citing United States v. Dinitz*, 492 F.2d 53, 59 (1974).

Unlike in *Dinitz, supra*, this is not a case where the defendant maintains "control over the course to be followed in the event of [judicial or prosecutorial] error". *United States v. Dinitz*, 424 U.S. at 609. Nor is this a traditional case where the defendant withdraws his guilty plea due to his active desire to go to trial, or where the defendant's sentence has been vacated at his own insistence, thereby vitiating any double jeopardy implications. *See United States v. Tateo*, 377 U.S. 463 (1967). It is sufficient to say that this is a situation where as a result of the erroneous state court decision, the petitioners had no recourse but to submit to one of two procedures, either

of which subjected them to further jeopardy. *United States v. Wilson, supra*. Surely, they cannot be found to have relinquished such funamental rights simply for choosing the procedure that was, for all intents and purposes, the lesser of two evils. To the contrary, it is the petitioners' contention that *any* procedure or action taken by the state pursuant to the Supreme Judicial Court's decision, constitutes double jeopardy.

In sum, the Massachusetts Supreme Judicial Court has decided an important question of federal law which was left open in *DiFrancesco*. The state court has interpreted *DiFrancesco* such that, at least in Massachusetts, no criminal defendant's sentence may be considered final for a period of sixty days. Whatever the double jeopardy implications may be to future defendants from this decision, it is apparent that these petitioners were improperly stripped of their legitimate expectation of finality in their original sentences.

This Court should not extend its holding in *DiFrancesco* to encompass the present situation.

CONCLUSION

For the foregoing reasons, this Court should grant petitioners' Petition for Writ of Certiorari.

Respectfully submitted,

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